APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 68,009.
CMR No. 28446.

UNITED STATES, APPELLEE

v.

JOSEPH R. FORTNER, SENIOR AIRMAN
U.S. AIR FORCE, APPELLANT

Argued April 7, 1993.
Decided Aug. 18, 1993.

For Appellant: *Captain Robert A. Parks* (argued); *Colonel Terry J. Woodhouse* (on brief); *Colonel Jeffrey R. Owens, Major Mary C. Yastishock, Major Alice M. Kottmyer, Captain Richard W. Aldrich.*

For Appelle: *Captain Jane M.E. Peterson* (argued); *Colonel Richard L. Purdon* and *Lieutenant Colonel Jeffery T. Infelise* (on brief); *Lieutenant Colonel Brenda J. Hollis.*

Opinion of the Court

COX, Judge:

The issue in this case is whether the opinion of a polygrapher that appellant had lied during a polygraph examination

was improperly smuggled into evidence by the Government.[1] We agree that such an implication was presented. However, under the circumstances of this case, there is no possibility that appellant was prejudiced. *See* Art. 59(a), Uniform Code of Military Justice, 10 USC § 859(a).

Appellant was tried on February 21-22, 1990, at Mather Air Force Base, California, by a military judge sitting alone as a general court-martial. Contrary to his pleas, he was convicted of two specifications of carnal knowledge with his 15-year-old niece, in violation of Article 120, UCMJ, 10 USC § 920.[2] The evidence against appellant consisted primarily of the testimony of the victim; the testimony of a cousin (who also admitted having carnal knowledge with the victim) that appellant had made an admission to him and had attempted to influence him to not admit his own misconduct or report appellant's and to not testify; and evidence of the victim's post-traumatic stress disorder and marked psychiatric change at about the time of the alleged events.

The evidence here in issue came about during cross-examination of appellant, wherein trial counsel raked appellant over

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[1] The granted issue asks:

> WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY PERMITTING, OVER DEFENSE OBJECTION, TRIAL COUNSEL TO INTRODUCE EVIDENCE REGARDING A POST-POLYGRAPH INTERVIEW OF APPELLANT, THE CLEAR IMPORT OF THE EVIDENCE BEING THAT APPELLANT HAD UNDERGONE AND "FAILED" AN OSI POLYGRAPH.

[2] The military judge sentenced appellant to a bad-conduct discharge, confinement and forfeiture of $400 pay per month for 1 year, and reduction to E-1; and the convening authority approved the sentence. The Court of Military Review set aside the finding of guilty of one of the specifications and dismissed it on the grounds of insufficiency of evidence. Reassessing the sentence, that court affirmed only so much of the sentence as provided for a bad-conduct discharge, confinement for 1 year, and reduction to E-1. 34 MJ 836, 841 (1992).

the coals about his semi-admitted attempts to silence his cousin. Abruptly switching gears, trial counsel launched into the sequence of questions and answers in issue, repeated here in its entirety:

> Q: [TC] Do you remember having a conversation with Agent Pulliam at Travis Air Force Base? Remember talking to him.
>
> ADC: Your Honor, I'm going to object at this point.
>
> TC: I'm not going to go into any matters that are inadmissible.
>
> ADC: Your Honor, I would still object. I don't know where counsel is going; and if she's getting—will, let me let Captain Dowling address that matter because he was on the case at the time before I was.
>
> DC: Your Honor, I think defense's position is that we're just getting into an area dealing with a post-polygraph conversation between the special agent from the OSI and Airman Fortner which was told to them in letter and by me, myself over the phone that no such post-polygraph conversation should occur and that would be our objection.
>
> MJ: You are asserting that you did communicate that to OSI agents that they were not to have a post-polygraph conversation with your client, is that right?
>
> DC: In letter form and over the phone.
>
> MJ: Then I'm going to sustain the objection. If they did that contrary to your instructions, I'll sustain that objection.
>
> TC: One moment, sir.
>
> MJ: Well, wait a minute. What is your position? Was he under a proper rights advisement?
>
> TC: He was under rights advisement, sir, and it wasn't an interview. I believe the proper term is a post-polygraph interview and this was not an interview, it was a

comment and an answer which is what I was trying to—the polygrapher asked him no questions and it was—

MJ: I'll permit the question, but feel free to renew; and if it is improper, feel free to renew your objection and I can, of course, disregard because this is a bench trial. Go ahead.

By Trial Counsel:

Q. *Do you recall Agent Pulliam making the comment that maybe it was time to tell your attorneys the truth?*

A. *His exacts [sic] words were, I think you should go back and tell your attorney the truth.*

Q. And do you remember saying, yeah, maybe I should?

A. I said, yes, I will.

Q. But you didn't, did you?

A. Yes, I have been, and I'm still maintaining the truth, ma'am.

TC: Thank you, nothing further.

MJ: Is there redirect?

ADC: Your Honor, prior to redirect, what I'd like to do is I would like to reimpose that objection that there were strict instructions that there was to be no post-polygraph interview. While this was not a question per se, *it falls into that category of a statement obviously meant to elicit a response and while we don't feel that the response is necessarily incriminating, it is a statement or technicality, a statement that we feel was made in an interrogation setting.*

MJ: No, I think it's admissible. I agree with you, and I'm not sure it's probative of anything, but I think it's admissible evidence, so I'm going to overrule the objection.

(Emphasis added.)

Appellant now complains that the opinion of the polygrapher (*i.e.*, that appellant had lied during the polygraph) was "obliquely introduced" into *evidence* through trial counsel's *question*: "Do you recall Agent Pulliam making the comment that maybe it was time to tell your attorneys the truth?" We agree that the implication that appellant was being less than candid during the polygraph examination is derivable from the question and that asking appellant to verify that the statement was made in that particular context placed the matter, and the potential inference, into evidence. However, the record cannot fairly be read to suggest that counsel's objection went to any implied opinion in the polygrapher's statement. Plainly, counsel and the military judge were both focused on the "response" "elicit[ed]," which happened to be nonincriminatory. Thus, the issue, to be cognizable, would have to amount to "plain error." *United States v. Fisher*, 21 MJ 327 (CMA 1986).

In that regard, we note that this case was tried well after our opinion in *United States v. Gipson*, 24 MJ 246 (CMA 1987), where we made it abundantly plain that any party wishing to introduce the results of a polygraph test or an opinion as to truth by a polygrapher had substantial foundational prerequisites to satisfy.[3] We have no reason to doubt that the military judge was well acquainted with our *Gipson* decision, and needless to say, there was absolutely no effort on the part of the prosecution to establish the relevance of the polygrapher's opinion in this case.

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[3] This case was tried prior to July 6, 1991, the effective date of Mil.R.Evid. 702, which purports to ban from admission at courts-martial "the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination." Exec. Order No. 12767, 56 Fed.Reg. 30284, 30295-96, 30299 (1991).

Further, the record does not disclose, and presumably the military judge did not know, what questions were asked by the polygrapher. Therefore, even if for some unimaginable reason the military judge were to have credited this polygrapher's alleged opinion in the slightest degree, the judge would have been forced to speculate wildly as to what appellant was supposed to have lied about. Moreover, appellant had earlier been forced to concede in his trial testimony that he had lied outright under oath in his pretrial (and pre-polygraph) statement to law enforcement officials. Therefore, the most fanciful theory of prejudice evaporates, for even if the judge noticed the polygrapher's presumed belief that appellant lied during the polygraph exam, that belief may well have been predicated on matters later admitted by appellant at trial. Suffice it to say, we are supremely confident that the military judge engaged in no such farfetched speculation and that he paid no heed whatever to any supposed implication in the polygrapher's hearsay statement to appellant. We are equally confident that no plain error or prejudice occurred here. *United States v. Fisher, supra*; Art. 59(a).

We confess to perceiving no possible relevance in appellant's *response* to the polygrapher's statement, but like defense counsel and the military judge, we perceive no possible prejudice either. Art. 59(a).

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges CRAWFORD, GIERKE, and Wiss, JJ., CONCUR.

APPENDIX B

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 28446.

UNITED STATES

v.

SENIOR AIRMAN JOSEPH R. FORTNER, FR316-60-7799
UNITED STATES AIR FORCE.

Sentence Adjudged 22 Feb. 1990.
Decided 11 March 1992.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Major Ronald G. Morgan.

Appellate Counsel for the United States: Colonel Robert E. Giovagnoni and Captain James C. Sinwell.

Before LEONARD, RIVES, and JAMES, Appellate Military Judges.

OPINION OF THE COURT

LEONARD, Senior Judge:

Contrary to his pleas, appellant was convicted in a bench trial of two offenses of committing carnal knowledge with his 15-year-old niece. His adjudged and approved sentence includes a bad-conduct discharge, confinement for 1 year, forfeiture of $400 pay per month for 12 months, and reduction to E-1. In his

appeal to us, he raises five issues. We find merit in one issue and set aside one carnal knowledge conviction.

I. Sufficiency of the Evidence

We first examine appellant's assertion that the evidence in the record is insufficient to support his convictions. To dispose of this issue, we begin with a discussion of the complicated fact pattern.

A. Facts

Appellant entered the Air Force in April 1986 and was assigned as an intelligence specialist at Mather Air Force Base, California. Over the next 3 years, his military record reflects outstanding duty performance meriting distinctive recognition on several occasions. At the time of the incidents for which he was convicted, appellant was 26 years old and single.

On 28 April 1989, appellant traveled to Denver, Colorado, on emergency leave to visit his sister-in-law, who was hospitalized with leukemia. During his visit, he stayed with his brother's family at their house. Present were both of his brother's daughters, ages 15 and 17. The younger of the two is the victim in this case. Additionally, the appellant's mother (the victim's grandmother), an adult male cousin B, and other members of appellant's extended family were visiting at the same time.

On the night of 29 April, the victim and cousin B partied together, drank heavily, and engaged in sexual intercourse in the basement of the victim's house. The following day, the victim arose around noon and met appellant in the living room with other family members. Throughout the afternoon, she rested on the couch. Late in the afternoon, the remaining family members left the house to visit appellant's sister-in-law and were gone for about an hour. Feeling ill, the victim stayed behind and continued to rest on the couch. Appellant remained with her.

According to the victim, once the others were gone, appellant began kissing her "romantically." Shortly thereafter, he asked her to accompany him to the basement, where he spread a blanket on the floor, and the two laid down and had sexual relations. According to the victim, appellant then told her not to tell anyone of the incident. In sworn testimony on findings, appellant denied the incident ever occured, maintaining that the victim remained asleep on the couch during the entire period the others were away.

Later that evening, appellant and cousin B went together to a video rental outlet. On the way, Cousin B confided in appellant out of a sense of guilt about his sexual relations the previous night with the victim. Appellant responded, "What would you say if I told you I did too." After a pause, appellant stated that he was joking. At trial appellant admitted he had made the remark, but said he did so to "lighten up the moment."

According to the victim, on the evening of 1 May (the next day), appellant asked the victim to meet him again in the basement in the middle of the night. She stayed up alone in her room listening to the radio until about 1 a.m. the next morning. She then made her way in the dark through the living room, where other family members were sleeping, to the basement. There she found appellant waiting, and once again the two had sexual relations. According to the victim, appellant again told her not to tell anyone. During his testimony, appellant denied that the second incident ever occured.

The victim's account of remaining in her room alone listening to the radio conflicts with the testimony of the victim's sister that the two girls were sleeping in the same room that night. Similarly, the victim's version of her descent in darkness through the living room to the basement is contradicted by other witnesses. According to both cousin B and the victim's grandmother, two of the family members she identified as sleeping in the living room that night had already left town. Cousin B also testified that in order for the victim to have passed through the

living room, she would had to have stepped over him or climbed over the furniture. He stated further that although he is a light sleeper, he was not disturbed that night.

On 2 May, the victim ran away from home for a week. She first reported her sexual encounters with appellant about a month later to a mental health worker at a psychiatric hospital where she had previously been institutionalized.

Cousin B testified that following his admission of sexual misconduct to appellant, both appellant and appellant's mother repeatedly pressured him not to talk with investigators. When appellant found out that cousin B had confessed to sexual misconduct, appellant told him that he had betrayed appellant. On the morning cousin B was scheduled to testify at trial, appellant inquired whether he intended to testify and stated, "You might as well put the cuffs on me yourself."

The court heard considerable testimony bearing on the victim's credibility. Evidence was admitted that the victim suffered serious substance abuse problems—both of alcohol, and drugs, including marijuana, cocaine, and LSD. Additionally, the victim had a history of deliquency and disciplinary problems at home. As to her reputation for truthfulness, the victim's grandmother testified that it was "no good." The victim' father testified that she would be honest "as to a major issue when finally confronted."

B. Analysis and Law

Under Article 66(c) of the Uniform Code of Military Justice, 10 U.S.C. § 866(c), this court has the duty to evaluate the evidence to insure it is both legally and factually sufficient to support any conviction. The Court of Military Appeals has clearly defined the standards for reviewing the evidence:

> The test for [legal sufficiency] is whether, considering the evidence in the light most favorable to the

> prosection, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having observed the witnesses, the members of the Court of Military Review are themselves convinced of the accused's guilt beyond a reasonable doubt.

United States v. Turner, 25 M.J. 324, 324-25 (C.M.A.1987).

Viewing the evidence in the light most favorable to the prosecution, we determine it to be legally sufficient to support the court's findings on both specifications. However, exercising our powers of factual review, we come to a different conclusion.

We first examine the specification charging the 30 April offense. Though we have concerns about the victim's credibility, we note that the judge viewed her testimony and found her to be believable. Hence, making allowances for having not been present in the courtroom, we find the evidence to be factually sufficient to support the conviction.

Examining the evidence of the 1 May offense, we arrive at a contrary conclusion. Our concerns extend beyond witness credibility to the factual consistency of key portions of the victim's story vis-a-vis the testimony of witnesses other than appellant. Her account of what occured immediately prior to her second sexual encounter with appellant conflicts with the testimony of every other witness—government and defense—who recounted what happened that evening. The cumulative effect of these factuals inconsistencies, coupled with our concerns regarding the victim's credibility, cause us to have a reasonable doubt that the appellant committed the charged offense on May 1.

II. Comments of Trial Counsel on Cross-Examination

Appellant contends that the military judge erred in permitting the trial counsel to act as a "human lie detector" during cross-examination of appellant. The assigned error refers to the following discourse:

> Q. Airman Fortner, I don't know how much training you have had in this, but sometimes when people don't tell the truth they do funny things, they fidget or they pull on their ear after they lie or their face gets red when they lie. Are you familar with that and does that make sense?
>
> A. Yes, ma'am.
>
> Q. Do you know what it is that you do when you lie?
>
> A. I'm not lying.
>
> ADC: Objection, Your Honor.
>
> TC: I asked a simple question.
>
> MJ: I think it's fair cross. I'm going to overrule the objection.
>
> By Trial Counsel:
>
> Q. Do you know what it is?
>
> A. That I do?
>
> Q. Mm-hmm.
>
> A. Not in particular, ma'am.
>
> Q. Would you be surprised to know that everytime you deny sleeping with [the victim], that you blink a lot right afterwards, but that when you talk about things like going to dinner and having spaghetti, you can look anybody in the face and talk about that all day without blinking. Does that surprise you?
>
> A. No, ma'am, because I'm not lying.
>
> Q. It doesn't surprise you then that you blink a lot when you talk about not having sex with [the victim] and that you don't blink when you talk about having dinner in the Italian restaurant?

A. Should it ma'am?
Q. Should it surprise you?
A. It doesn't, because I'm telling the truth.

We find the trial counsel's comments to be improper in this case. Noting the mannerisms of a witness for the record is permissible at the discretion of the military judge.[1] *Cf. United States v. Miller*, 14 M.J. 924,925 (A.F.C.M.R.1982)(the failure to record facial gestures or body language does not render a record incomplete). However, the trial counsel went beyond this, expressing a personal opinion regarding the truthfulness of appellant's testimony.

Judging the credibility of evidence remains solely within the province of the finder of fact. It is well established that witness testimony expressing an opinion on the truthfulness of another's statement is not admissible at trial. *United States v. Adkins*, 5 U.S.C.M.A. 492, 18 C.M.R. 116(1955); *United States v. Wagner*, 20 M.J. 758 (A.F.C.M.R.1985). Additionally, the role of the expert witness has been carefully confined to avoid testimony as a "human lie detector." *United States v. Partyka*, 30 M.J. 242 (C.M.A.1990); *United States v. Tolppa*, 25 M.J. 352 (C.M.A.1987); *United States v. Petersen*, 24 M.J. 283 (C.M.A.1987); *United States v. Cameron*, 21 M.J. 59 (C.M.A.1985).

In the past, this Court has specifically held that the interpretation of body language is not the proper subject of testimony. *United States v. Clark*, 12 M.J. 978, 979 (A.F.C.M.R.1982). Furthermore, counsel may not argue their personal opinions

[1] We note that after the adverse ruling on the objection, defense counsel used this tactic to his advantage:

> ADC: Your Honor, can we let the record reflect that on those last three answers, Airman Fortner was not blinking.

While ordinarily it would not be proper to record the absence of facial gestures or other body language, it was appropriate under these circumstances.

regarding truthfulness of the testimony of any witness, particularly the accused. *v. Knickerbocker*, 25 U.S.C.M.A. 346, 54 C.M.R. 1072, 2 M.J. 128 (1977).[2] It follows that during examinatino of a witness, counsel may not weave a personal assessment of the witness' body language into the content of the questions. Hence, we find the military judge abused his discretion by overruling the defense objection and permitting this line of questioning. However, we consider any prejudice that may have flowed from this error rectified by our disapproval of one of appellant's convictions.

III. Improper Rebuttal

Appellant also complains that the military judge erred by permitting trial counsel to introduce improper rebuttal evidence. During cross-examination of appellant's mother, the following dialogue occurred:

> Q. Do you remember talking to your son, [the victim's father], Monday night?
>
> A. Mm-hmm.
>
> Q. Do you remember what you told him about this particular offense?
>
> A. I told him that I didn't believe it ever happened and he told me—that he said, to tell you the truth of it, I'm not even sure that it's the truth.
>
> Q. [The victim's father] is trying to stick up for his brother in your eyes, isn't he?
>
> A. I don't know if that's what he was doing. He just said that he couldn't swear to it that she was even telling the truth?

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[2] Voicing the opinions of counsel in the court-room also raises ethical considerations. A common tenet of professional ethics codes forbids an attorney from stating at trial a personal opinion regarding the credibility of a witness. American Bar Association Model Rules of Professional Conduct, Rule 3.4(e) (1983); *accord,* Air Force Rules of Professional Responsibility, Rule 3.4(e) (1989).

After the defense rested, the government called the victim's father to testify that he had not made the comments at issue. The military judge permitted the testimony over defense objection.

The government may rebut evidence offered by a defense witness that is non-responsive to an inquiry on cross-examination. *United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989). In this case, the trial counsel's line of questioning was proper cross-examination of appellant's mother. Mil.R.Evid. 608(c). In response to a narrow question designed to elicit her comments made during an out-of-court conversation, she gratuitously offered comments made by the other party to the conversation. There is no indication in the record that the trial counsel engineered the question to extract otherwise inadmissible evidence from the witness or to set her up for rebuttal. *See United States v. Maxwell*, 21 M.J. 229 (C.M.A. 1986). Hence, the military judge's ruling permitting the government to rebut the evidence by direct testimony was not an abuse of discretion. *Trimper*, 28 M.J. at 467.

We find the remaining assignments of error to be without merit.

IV. Reassessment of Sentence

On the basis of our review for factual sufficiency, the finding of guilty to the specification alleging the 1 May 1989 carnal knowledge offense is set aside and dismissed. The findings of guilty to the charge and the remaining carnal knowledge specification are affirmed.

Our modification to the court's findings causes us to reassess the sentence. Relying only on those matters properly before the military judge, we are satisfied that we can determine the sentence the court "would probably have adjudged if the error had not been committed at trial." *United States v. Peoples*, 29 M.J. 426, 427 (C.M.A. 1990); *see United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

Reassessing the sentence, we approve only so much of the sentence as provides for a bad-conduct discharge, confinement for 1 year, and reduction to E-1. Considering the entire record, the reassessed sentence is appropriate. Accordingly, the findings of guilty and the sentence, both as modified, are correct in law and fact and are

AFFIRMED.

Judge RIVES concurs.

Judge JAMES dissents:

I disagree with the majority's assessment of the persuasiveness of the evidence, its treatment of the "human lie detector" cross-examination, and its disposition. I would affirm the findings and the sentence.

This case illustrates the requirement of Article 66(c), UCMJ, 10 U.S.C. § 866(c) (1988) that we affirm only such findings and sentence as we find correct in law and *fact*. We are explicitly given authority to "weigh the evidence" and "judge the credibility of witnesses," and we do. *Id.* We three have retried this case, and the majority has voted to acquit appellant on one specification. Thus, we sit today as much as jury as we sit as appellate court. When we examine the factual sufficiency of the evidence, we engage in a very subjective review. Thus, it does my colleagues no dishonor to say that I disagree, for the matter must be resolved by each of us individually, beyond a reasonable doubt.

I also disagree with the majority's treatment of the cross-examination. Appellant framed the issue cleverly, suggesting that this court-martial had heard the kind of "human lie detector" *testimony* that has been condemned in other cases.[3] In fact,

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[3] I note that the illustrative decisions cited by the majority involve efforts to have one witness testify about the credibility of *another*. Furthermore, they were cases in which either an expert or pseudo-expert was asked to do so. It is hardly likely that the majority intends to imply that

it heard no such testimony. It did hear *questions* by the trial counsel that imbedded that kind of thought, but I view that as perfectly acceptable.

Counsel have wide latitude on cross-examination, and credibility is one of the topics to which cross-examination is explicitly dedicated. Mil.R.Evid. 611(b). This trial counsel used a classic technique of cross-examination that is within that wide latitude and especially apt for explorations of credibility: She tried to put words into the witness's mouth and watched to see whether the witness would permit it.[4] This method sometimes shows the witness to be susceptible to manipulation and therefore less credible. Confronting a witness with the witness's tics might, in an exceptional case, demonstrate the witness's demeanor very convincingly, and counsel are entitled to try that tactic if they wish, at least briefly. When they do so, they must do the only thing they are allowed to do on cross-examination: They ask *questions*. There is the central difference between my view and that of the majority: I say trial counsel asked questions, appellant implies that she testified, and the majority says she commented.

It is often taught, in the lurid shorthand used in forensics courses, that it must always be thus, that an effective lawyer does *all* the testifying on cross-examination and the witness merely subscribes. Such a statement effectively communicates the thought intended, but it does so at the cost of accuracy. We all know that lawyers may not testify during examination; witnesses testify. No witness in this case gave "human lie detec-

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it is improper to invite witness X during cross-examination to admit that witness X is unreliable in one respect, many, or all. That is a major objective of many such examinations, though they are the most difficult.

[4] It is not relevant to our disposition that the technique does not seem to have especially well in this case. Trial counsel treid to use an ax instead of a razor, and the witness seems to have seen it coming. Had trial counsel persisted ineffectively, the military judge could certainly have regulated the waste of energy under Mil.R.Evid. 403; R.C.M. 801(a)(3).

tor'' testimony. Though invited to do so by trial counsel's questions, the witness refused to be duped. That should have been the end of this issue.

The time for comment is argument, but no one has complained about any improper comment during arugment. It does not follow from *Clark* that counsel may not comment in argument upon a witness's ''body language''; *Clark* only holds that experts and pseudo-experts may not give *testimony* about their ''body language'' theories of credibility. It would shock the bar to hear that a lawyer may not argue in closing that a witness's behavior during examination suggests dishonesty or less than complete confidence in the answers given. Thus, a ''common experiences of mankind,'' or ''ways of the world'' argument is acceptable, but junk science testimony is not. The crux of the issue is the *Knickerbocker* problem, that counsel may not express their own views. But trial counsel never stated her own opinion. She just asked questions.

To accused trial counsel's *questions* of being comment attributes to the listener the inability to discriminate between a question and an assertion. It is sometimes true in the human experience that listeners cannot do so, but this experienced military judge can be fairly trusted to have discriminated between counsel's question and the witness's reply. Had there been any danger that he would have been impaired, one would have expected defense counsel to complain that the questions were argumentative, but there was no such objection.[5]

I am equally unimpressed with the quibble about the propriety of trial counsel's rebuttal of the gratuitous, nonresponsive answer given during cross-examination by trial counsel. *See* Mil.R.Evid. 402, 403, 611(a); R.C.M. 801(a)(3). The whole matter is hardly a fly-speck in the record. The military judge's decisions were within his discretion, and he did not abuse it.

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[5] It should be evident from my approach to this issue that I have found no place at which trial counsel gave her opinion of the credibility of a witness, and therefore I find no ethical dimension to this case.

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